FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FCP/141486

PRELIMINARY RECITALS

Pursuant to a petition filed June 08, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. in regard to Medical Assistance/Family Care, a hearing was held on September 12, 2012, at Milwaukee, Wisconsin.

The issue for determination is whether the agency properly denied the Petitioner's reque st for a Dex Com continuous glucose monitoring device.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

Penelope Groth
6737 W Washington St Suite 3230
Milwaukee, WI 53214

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Kathy Paccagnella
Community Care Inc.
3220 W. Vliet St.
Milwaukee, WI 53208

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County. Petitioner has been enrolled in Community Care/Family Care since July 1, 2010.

2. Petitioner has diagnoses of brittle Type I diabetes, bulimia, depression, hepatitis C, chronic pain and neuropathy. The Petitioner's ISP contains an outcome to keep her diabetes managed well.

3. Petitioner has had Type I diabetes diagnosis since age 5. Due to the length of time Petitioner has had the diagnosis and multiple severe hypoglycemic episodes, she has developed neuropathy and "hypoglycemia unawareness" which means that she is not always able to sense when her blood sugars are dropping.

4. Emergency medical personnel have responded to the Petitioner 101 times in the last 4 years to address acute hypo or hyperglycemic attacks. During the attacks, the Petitioner is often confused and cognitively impaired to the point of being rendered unconscious or unable to determine what course of action to take for her own safety.

5. Petitioner has a glucometer and is independent with finger sticks and administration of insulin.

6. On April 13, 2012, the Petitioner requested a Dex Com continuous glucose monitoring sensor device from the agency. The Dex Com device is an FDA approved sensor that is inserted under the skin to detect blood glucose within interstitial fluid space. The sensor does not directly measure blood glucose levels. An algorithm is built into the receiver to correlate the concentration of glucose in the bloodstream with the glucose detected by the sensor in the interstitial fluid. The receiver is calibrated at least every 12 hours using a blood glucose reading (finger stick). If the sensor detects high or low blood sugar, an alarm sounds and the patient is thus alerted to immediately conduct a finger stick to see the exact sugar level. The patient can then take action to treat the condition. The Dex Com does not replace the glucometer or the necessity for finger sticks. In addition to sounding an alarm when blood sugar is high or low, the Dex Com readings can be downloaded to show trends. This information can be used by a physician to see a detail of how the patient's diabetes is controlled and allow for accurate adjustments of medication.

7. On April 13, 2012, the agency conducted a Resource Allocation Decision (RAD) regarding the Petitioner's request for a Dex Com device. The agency noted the Petitioner has had multiple episodes of hypoglycemia exacerbated by bouts of bulimia causing the frequent interventions by paramedics as noted in Finding of Fact #4 above.

8. The Dex Com device costs $1,158 - $1,448 plus an ongoing monthly cost of $319 – 460 for the sensors which need to be replaced every 3 – 7 days.

9. On April 25, 2012, the agency denied the Petitioner's request based on its conclusion that the Petitioner does not need the Dex Com to support her outcome of keeping her diabetes managed.

10. On May 31, 2012, a Grievance and Appeals Committee meeting was held. On June 5, 2012, the Committee issued a decision affirming the agency's denial of the Dex Com. Its determination was based on a conclusion that the Petitioner's need to monitor and respond to changing glucose levels can be met with her glucometer. It gave the Petitioner the option of agreeing to a trial of the Dex Com administered by a Certified Diabetic Educator to determine her ability to identify blood sugar trends and effectively respond and to demonstrate that the Petitioner can insert and change needles safely and effectively.

11. The Petitioner completed a trial of the Dex Com device during the week of June 25, 2012 – July 1, 2012.

12. On June 8, 2012, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. Whenever the local Family

Care program decides that a person is ineligible for the program, or when the CMO denies a requested service, the client is allowed to file a local grievance.

The state code language on the scope of permissible services for the FC reads as follows:

> HFS 10.41 Family care services.…
>
> (2) SERVICES. Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n(c) and ss.46.275, 46.277 and 46.278, Stat., the long-term support services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.
> Note: The services that typically will be required to be available include adaptive aids; …home modification; … personal care services; …durable medical equipment…and community support program services.

Wis. Admin. Code §HFS 10.41(2).

The general legal guidance that pertains to determining the type and quantity of care services that must be placed in an individualized service plan (ISP) is as follows:

> DHS 10.44 Standards for performance by CMOs.
> …
> (2) CASE MANAGEMENT STANDARDS. The CMO shall provide case management services that meet all of the following standards:
> …
> (f) The CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate. … The service plan shall meet all of the following conditions:
>
> 1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e)1.
>
> 2. Reasonably and effectively addresses all of the enrollee's long - term care outcomes identified in the comprehensive assessment under par. (e)2 and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
>
> 3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.
> …

Wis. Admin. Code §DHS 10.44(2)(f).

The agency testified that the inter-disciplinary team (IDT) investigated the Dex Com device after receiving the request from the Petitioner. The IDT determined the Dex Com is not the safest option for the Petitioner due to a number of concerns including the fact that the device does not replace the need for the Petitioner to do finger sticks and blood sugar testing with the glucometer, it possibly increases the amount of testing the Petitioner will need to do, it necessitates the need to conduct an immediate test, and it produces only a reading of blood sugar averages. Because it does not replace the need for finger sticks and a glucometer to test the exact blood sugar level, the agency argues it is a duplication of services. Also, because it does not measure exact blood sugar level, the agency argues it does not meet the Petitioner's outcome of maintaining her diabetes.

The agency also testified that the Petitioner has a history of problems in monitoring and appropriately maintaining her diabetes. Specifically, it noted the Petitioner has a history of frequent injections of glucagon without any blood glucose readings being done prior to the injection. In addition, the Petitioner has a history of bulimia and not being able to adhere to a proper diet. The agency contends the bulimia condition and lack of proper diet contribute to fluctuations in the Petitioner's blood sugar. The agency also testified that the Petitioner was not able to describe how to treat hypoglycemia when asked during the grievance meeting.

In addition to concerns about the Petitioner's problems in monitoring and maintaining her diabetes, the agency indicated financial concerns regarding the Dex Com. The agency noted that there is another manufacturer, Medtronic, with a device comparable to the Dex Com. The agency testified that it is unknown whether this device is a possible alternative to the Dex Com and what its cost would be for the Petitioner's condition.

The Petitioner was represented at the hearing by a representative from Disability Rights Wisconsin. The Petitioner's representative argues that the current ISP does not meet the Petitioner's needs for managing her diabetes as evidenced by the extensive number of paramedic visits that have been necessary to treat severe hypoglycemia in the Petitioner. The Petitioner concedes the Dex Com does not take an exact measure of the Petitioner's blood sugar like the glucometer. It is meant to detect when the Petitioner's levels fall below or go above a certain number warning the Petitioner of the need to check blood sugar level. The warning system is meant to prevent a hypo- or hyperglycemic episode. This is especially important for the Petitioner who has developed a physical condition that does not allow her to sense when blood sugar levels are falling or rising. Thus, the Petitioner argues that Dex Com is not a duplication of services because it is not meant to serve the same purpose as a glucometer. The Petitioner argues the Dex Com is the only option that effectively meets the Petitioner's outcome given her inability to detect or become aware of changes in blood sugar levels. The Petitioner notes that the MCO must approve items that are necessary to "reasonably and effectively support the member's outcomes identified in the comprehensive assessment as well as those necessary to assist the member to be as self-reliant and autonomous as possible."

The Petitioner argues that the agency has failed to acknowledge Petitioner's continuous attempts to gain control over her diabetes over the past 30 years and has failed to acknowledge that the device compensates for Petitioner's hypoglycemic unawareness. Specifically with regard to the agency's claim that the Petitioner continues to suffer from bulimia and is non-compliant with a proper diet for diabetes, the Petitioner does receive mental health treatment for bulimia. Further, the Petitioner testified that she is not actively experiencing symptoms. The Petitioner also argues that the evidence does not indicate that bulimia is a current factor in the incidents of hypoglycemia. The Petitioner presented a statement from her primary care physician who has provided care to the Petitioner for 30 years. His letter indicates the Petitioner has been compliant in her diabetic follow up and that she has consistently made efforts over the years to gain control of her conditions.

The Petitioner's representative also argues that the RAD process was not properly followed. At the time of the Petitioner's request on April 13, 2012, the Petitioner indicated to the agency that she would submit additional information from her primary care physician regarding the need for the Dex Com. Petitioner contacted the agency on April 23, 2012 again informing them that she intended to submit information from her doctor as well as records of paramedic contacts. On April 23, 2012, the IDT made its decision and sent a notice of action to the Petitioner on April 25, 2012 without having reviewed any information from the Petitioner.

The Petitioner's representative further notes that the Grievance and Appeals Committee gave the Petitioner the option to participate in a trial of the Dex Com device to determine the Petitioner's ability to identify blood sugar trends and effectively respond to avoid hypoglycemic episodes. The Petitioner completed a trial of the Dex Com during the week of June 25, 2012 – July 1, 2012. The Petitioner argues that the results of the trial, the evidence submitted by the Petitioner's physician in a letter dates August 23, 2012 and evidence submitted by a diabetic education instructor dated September 11, 2012 show the Petitioner was able to operate the device without difficulty and was able to respond appropriately to the alarm and take appropriate treatment measures before a hypoglycemic crisis. The Petitioner notes that despite the successful trial, the agency continued to deny the device stating that the Petitioner did not need it to meet her outcomes. The Petitioner notes that the agency did not offer a trial of the alternative Medtronic device and did not deny the Dex Com in favor of the Medtronic device.

The agency produced evidence of protocols that it developed for continuous glucose monitoring. As pointed out by the Petitioner at the hearing, these protocols were not developed at the time the agency made its decision regarding the Petitioner's request. The agency did not present su fficient information regarding whether the Petitioner meets the standards outlined in the protocol. The Petitioner's representative argues that the protocols are not relevant because the agency did not rely on it to make the determination in this case and further argues that the Petitioner has met the standards of the protocol.

Based on the evidence, I conclude that the agency has not demonstrated that the Dex Com is a duplication of services the Petitioner already receives and that it does not meet the standards in § DHS 10.44.

Specifically with regard to the duplication of services argument, I do not find it persuasive that because the Petitioner is still required to do blood sugar testing with a Dex Com, it is a duplication of services and not necessary to appropriately manage her diabetes. The Dex Com does not, as pointed out by the agency, take an exact measure of blood sugar. That is not its purpose. Its purpose is to alert the Petitioner that blood sugar is either decreasing or increasing so that she can take action to test her blood and take action to prevent a hypo or hyperglycemic episode. Especially given the Petitioner's condition of hyperglycemic unawareness, this device has the potential to avert the need for the Petitioner to have paramedic intervention as frequently as she has required in the past. I am persuaded that this device, along with the glucometer, is a reasonable and effective way for the Petitioner to properly manage her diabetes.

I do not find merit in the agency's position that the Petitioner's bulimic condition should be a reason to deny this device to the Petitioner. The agency seems to take the position that Petitioner's bulimia is a choice that the Petitioner has made, rather than a mental health issue for which the Petitioner is being treated. There is no support in the agency's evidence that the Petitioner's bulimia is the primary cause, or even a cause, of the Petitioner's diabetes. Even if it is a factor, the Petitioner's mental health condition should not be a determinant in whether this device can reasonably and effectively meet her medical needs with regard to diabetes as long as the Petitioner can effectively operate the device and take appropriate action based on the results. The Petitioner successfully trialed the device and demonstrated that she can operate it and take appropriate action.

As to cost-effectiveness of the Dex Com, the agency argued that there was no evidence regarding the Medtronic device and its cost as compared to the Dex Com. The agency did not present any evidence that it attempted to determine whether the Medtronic device is a cost-effective alternative. It did not ask the Petitioner to trial the Medtronic. There is no evidence that the Dex Com is not the most cost-effective option for the Petitioner.

Based on all of the evidence presented, I conclude the Petitioner has demonstrated that the Dex Com device meets the standards in DHS §10.44 to address her diabetes management. The agency did not properly deny the Dex Com device to the Petitioner.

CONCLUSIONS OF LAW

The agency did not properly deny the Petitioner's request for a Dex Com continuous glucose monitoring device.

THEREFORE, it is ORDERED

That this matter is remanded to the agency to take whatever administrative steps are necessary to approve and provide the Dex Com continuous monitoring system to the Petitioner. These steps shall be completed within 10 days of the date of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 12th day of October, 2012. 2012

_____

Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

c: Community Care Inc. - email
Department of Health Services - email
Penelope Groth, Disability Rights - email

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on October 12, 2012.

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